90-1233

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Supreme Court, U.S.
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No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1990.

JAMES M. KEOHANE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari.

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QUESTIONS TO BE PRESENTED.

I. Whether under the rule of Grunewald v. United States, 353 U.S. 391 (1956) an act, the receipt of salary payments, which is the result of a conspiracy, may properly be regarded as an overt act in furtherance of the conspiracy for the purpose of extending the Statute of Limitations?

II. Whether incidental mailings of Notices of Interview by a government agency satisfies the mailing element of 18 U.S.C. §371?

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OPINIONS BELOW

The opinion of the Court of Appeals, United States v. James M. Keohane, No. 90-1029, is not yet reported. (App. A).

JURISDICTION

The decision below issued on November 21, 1990. A Motion To Stay the Mandate was filed and denied. An Application for Release Pending Certiorari was filed and denied by Souter, J., on January 3, 1991. This petition for Writ of Certiorari is filed within ninety days. The jurisdiction of this Court is claimed under 28 U.S.C. §1254(1).

STATUTE INVOLVED.

18 U.S.C. §3282. **Offenses not capital**

Except as otherwise provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE.

On March 14, 1989, James M. Keohane was charged, by indictment, with conspiracy to commit mail fraud in violation of 18 U.S.C. §371. A superseding indictment alleging an additional overt act was returned on September 26, 1989. The superseding indictment charged:

> 6. it was the "objective of the conspiracy that defendant James M. Keohane, then a captain in the Malden Police Department be provided illegal assistance in taking a civil service examination for promotion to chief in the Malden Police Department, in exchange for money and services and favors to be accorded Gerald W. Clemente for providing that assistance".

The indictment alleged that the

conspiracy commenced on or about February 6, 1982. It further alleged three overt acts within the Statute of Limitations period:

1. that Keohane accepted salary payments at the rank of chief after March 21, 1984.

2. that Keohane caused the Malden Police Department to hire Robert W. Clemente, Jr., the nephew of co-conspirator Gerald W. Clemente, as a reserve police officer on March 21, 1984, and;

3. that Keohane notarized the mark of Clemente's father on a deed dated January 23, 1985.

Prior to trial Keohane moved to dismiss the indictment on the ground that the prosecution was barred by the statute of limitations and at the close the

government's evidence he moved for judgment of acquittal on the same ground.

Following conviction, Keohane appealed to the Court of Appeals for the First Circuit, raising the following issues:

1. Whether prosecution of the indictment charging conspiracy to commit mail fraud was barred by the five year statute of limitations, 18 U.S.C. §3282?

2. Whether the government failed to prove beyond a reasonable doubt that the defendant committed an overt act in furtherance of the conspiracy within the statute of limitations?

3. Whether the trial judge erred in his instruction on causation regarding the appointment of Robert Clemente, Jr. to the Malden Police Department?

4. Whether the government proved beyond a reasonable doubt all elements necessary to sustain a conviction for conspiracy to commit mail fraud?

The Court of Appeals affirmed. (App. A.)

REASONS FOR GRANTING THE WRIT.

I. The decision below conflicts with the application of the Statute of Limitations to conspiracy charges as established in Grunewald v. United States, 353 U.S. 391 (1956).

In Grunewald, this court stated the rule for determining when time limits begin to run on a conspiracy charge:

> "... the crucial question in determining whether the Statute of Limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of

> the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy".

Grunewald, 353 U.S. at 397.

Therefore, designation of an act as an overt act must be made in reference to the breadth of the conspiratorial agreement. The indictment alleged that Clemente and Keohane conspired to defraud the Commonwealth and the Department of Personnel Administration of property in form of confidential information as to the contents of civil service police promotional examinations and answer keys. It further alleged that Clemente and Keohane conspired to defraud the Commonwealth and the City of Malden of property in the form of salary and benefits paid to the defendant. In order to accomplish this objective Clemente

would provide Keohane with illegal assistance in taking the promotional exam in order to increase his chance of becoming Chief of the Malden Police and in return Clemente would receive a sum of money from Keohane and "services and favors".

The indictment, returned on March 14, 1989, alleged that the conspiracy began on February 6, 1982. The applicable Statute of Limitations, 18 U.S.C. §3282, requires that the indictment be returned within five years after the commission of the offense. Therefore it was incumbent on the government to prove an overt act in furtherance of the conspiracy after March 14, 1984. Keohane was promoted to Chief on June 23, 1983. He made his last payment, a little shy of $5,000.00, to Clemente in December, 1983.

It is submitted that the receipt of continuing salary payments is merely the continuing result of the conspiracy and does not constitute an overt act in furtherance of the conspiracy for the purpose of extending the Statute of Limitations. It is without real dispute that the core objective of the conspiracy was achieved with Keohane's promotion and his payoff to Clemente. As described in United States v. Doherty, 867 F.2d 27, 58 (1st Cir. 1987), cert. denied, 109 S.Ct. 3243 (1989), (the first so called "Examscam" case in which the question of whether salary payments could constitute overt acts first arose), Examscam ..."simply was a scheme dishonestly to obtain, and help others obtain, promotions".

In Doherty, with regard to receipt of

salary payments, the First Circuit reasoned,

> It may seem reasonable to say that the act of receiving a conspiratorial objective is part of the conspiracy, where the receiving consists of one action, or a handful of actions, taking place over a limited period of time, or where some evidence exists that the special dangers attendant to conspiracies, the dangers of 'concerted activity' and 'group association' for criminal purposes, remain present until the payoff is received.

Doherty at 61.

However, the court continued,

> [w]here receiving the payoff merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions, such as receiving

> salary payments, and there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place, we do not see how one can reasonably say that the conspiracy continues.

Id.

Under Doherty salary payments alone do not constitute overt acts unless there is some evidence that "concerted activity and group association for criminal purposes" remain present. In Doherty, the continued activities involved remodeling Clemente's kitchen, help in obtaining city towing contracts, and obtaining bail bond business for Clement's girlfriend. Unlike the acts in the instant case, the acts in Doherty afforded substantial benefit to the co-conspirator, particularly economic benefit and in most instances were illegal. See, also, United States v.

Fitzpatrick, 892 F.2d 162, 167 (1st Cir. 1989).

Here, the alleged continued activity concerns an instance of no action on the part of the defendant with regard to the hiring of Clemente's nephew and the de minimis act of notarizing a deed without charge. The court below declined to reach the question as to whether these "acts" constituted overt acts as alleged by the government, but deemed the acts to constitute "concerted activity" sufficient to extend the statute of limitations. This expansive interpretation is contrary to Grunewald and to Doherty, itself, which was limited to group association for "criminal purposes".

In Grunewald, acts of concealment, after the main objectives of the conspiracy had been accomplished, were

held not to operate to extend the statute of limitations. Indeed, in Grunewald, there was continued association between the co-conspirators.

> .. we have the fact that great efforts were made to conceal the conspiracy when the danger of exposure appeared. For example, Balich got rid of certain records showing that he had used Grunewald's hotel suite in Washington; Patullo's accountant was persuaded to lie to the grand jury concerning a check made out to an associate of the conspirators; Grunewald attempted to persuade his secretary not to talk to the grand jury; and the taxpayers were repeatedly told by Halpern and his associates to keep quiet."

353 U.S. at 403.

Clearly, there was evidence in Grunewald

of continued concerted activity. However, this concerted activity was not sufficient to extend the statute of limitations. This Court refused to "broaden the already pervasive and wide sweeping nets of conspiracy prosecutions." 353 U.S. at 404. The court stated:

> We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished [emphasis supplied].

353 U.S. at 405.

The court below, however, has extended the statute of limitations and opened the floodgates of prosecution based

upon acts that have no relation to furthering the main criminal objectives of the conspiracy. First, the court below concluded that Keohane had "promised" Clemente that the Malden Police Department would hire his nephew. There is no evidence of a promise. Clemente testified that sometime in 1984 he had a telephone conversation with Keohane in which he told him that his nephew had been turned down by the Metropolitan Police for failing the psychological exam and asked if Malden conducted psychological tests, to which Keohane said no. Clemente then asked:

> "... is there any way that you could help him get a job in Malden. He replied that he could probably get him on the reserve and at a later date could make him a permanent police officer" (Vol. VI, 108).

After testifying that he had no further conversation with Keohane until after his nephew was appointed to the reserve list, Clement remembered another conversation with Keohane prior to his nephew being hired, but could not remember the date of the conversation (Vol. VI, 109). Clemente related the following:

> "I asked him about my nephew going on the reserve force and he thought that he, he thought he told me that the kid would be going on. He didn't know when he could be made permanent. But if he was on the reserve list that even if the list died, the list for the, from the entrance exam, he would still be made permanent police officer."
> (Vol. VI, 109).

There was no evidence that this conversation took place after March 14, 1984. The nephew was appointed, following

the recommendation of one Captain Buckley, on March 21, 1989. The civil service list from which he was appointed was certified on February 29, 1984 (Ex. 56, 57). Therefore, even if it be deemed that a "promise" had been made, there is no evidence that it was made within the 5 year statute of limitations period. Moreover, there is no connection between Keohane's inactivity[1] on behalf of the nephew and the achievement or furtherance of the main criminal objectives of the conspiracy.

As to the notarization of the deed, this act is de minimus. The Court of

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[1]The unrebutted testimony was that Keohane had no authority to appoint; he did not participate in the appointing process; he never spoke to the officer who recommended that the nephew be appointed, nor did he speak to the Police Commissioner who made the actual appointment.

Appeals failed to note that the deed had been executed in the office of an attorney who had witnessed the father's mark and had so acknowledged. Moreover, there is no basis for concluding that the act of notarizing this deed was a quid pro quo for receipt of the exam and not merely a favor, the same as performed by Keohane in June of 1981 in notarizing a deed for Clemente, prior to any conspiracy.

In any event, to designate such activity, as "concerted" activity - not criminal and not in furtherance of the main criminal objectives of the conspiracy - for the purpose of extending the statute of limitations is directly contrary to policy considerations set forth in Grunewald and in direct conflict with the oft stated proposition that "criminal statute of limitations are to be liberally

interpreted in favor of repose." United States v. Marion, 404 U.S. 307, 322, n.14 (1971).

The decision below also conflicts with the limitations placed on conspiracy prosecutions in United States v. Kissel, 218 U.S. 601, 607 (1910) wherein Justice Holmes explained that once the objectives of the conspiracy have succeeded " the mere continuance of the result of [the] crime does not continue the crime ... for purposes of the Statute of Limitations".

The decision below also ignores an important distinction recognized in the other circuits, i.e., whether or not the continued association of the conspirators was necessary to the ultimate success of the conspiratorial objective. For example, the Eleventh Circuit in United States v. Dynalectric, 859 F.2d 1159 (11th Cir.

1988) found that a conspiracy to restrain trade by collusive bid-rigging continued so long as one or more of the conspirators continued to receive payment under a collusive contract. Those payments were deemed to be the obvious objective of the conspiracy and the payments would not have occurred if the parties had ceased to cooperate, in other words, cooperation or continued association was necessary to the "successful accomplishment of the crime". Dynalectric at 1568-1569. Here, however, Keohane's receipt of salary payments, was not dependant upon and had nothing to do with further cooperation with Clemente; the criminal objective had already been obtained.

II. THE BROAD CONSTRUCTION OF THE MAILING ELEMENT OF 18 U.S.C. §1341 GIVEN BY THE COURT BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT.

The mail fraud statute provides in pertinent part:

> Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... for the purpose of executing such scheme or artifice or attempting so to do ... knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, ... 18 U.S.C. §1341.

The statute is susceptible to both broad and strict interpretation as to the mailing requirement and it is suggested that it is the latter view which in most consistent with the precedent of this Court. In Kahn v. United States, 323 U.S.

88, 95 (1944) this court articulated the scope of the statute:

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.

It should be noted that the state crime asserted in the instant case is the misdemeanor offense of cheating on civil service exams in violation of Massachusetts Gen. Laws, c. 31, §74. The prosecution federalized this crime based upon the incidental use of the mails by the Civil Service Commission in routine mailings of notices of exams, the general, but not necessary, use of the mails to notify applicants of the results of the exam and notification of interviews.

There is an absence of any evidence of use of the mails in furtherance of the crux of the scheme, i.e. the theft of the exams by Gerald Clemente or his distribution of the exam to Keohane or his receipt of payment for the stolen exams. Moreover, the alleged economic benefit to Keohane, receipt of salary payments from the Malden Police Department did not involve the use of the mails.

While it is true that use of the mail need not be an essential element of the scheme, Pereira v. United States, 347 U.S.1, (1954), it is equally true that more is required than that the mails, in fact, are used as a result of the fraudulent scheme. The requirement is that the mail be used for the purpose of executing the scheme. Here, it is suggested as in Kahn, Parr v. United

States, 367 U.S. 370 (1960), and United States v. Maze, 412 U.S. 395 (1974), the routine mailings were immaterial to the execution of the scheme. Moreover, as in Parr, the routine mailing of notices, and results of the exams would have been made regardless of the scheme; the mailings occur with the giving of the examinations in general and are directed to all who take the examinations, whether or nor they have obtained an advance copy of the exam. An entirely different situation would obtain had the theft or distribution of the exams involved the use of the mails.

Petitioner is not suggesting that merely because the mailings in this case were routine, the mailing requirement was not met. Carpenter v. United States, 484 U.S. 19, 98 L.Ed 2d 275 (1987) is to the contrary. However, in Carpenter, unlike

the instant case, the routine mailing of the Wall Street Journal was an essential part of the scheme. Briefly, Carpenter involved the leaking (to stockbrokers) of confidential information which would later be published in a column in the Wall Street Journal. Since the column had the potential of affecting stock prices, the brokers bought and sold stocks based on the probable impact of the column on the stock market. Therefore, had not Winan's column been made available to customers of the Journal, there would have been no effect on stock prices and no likelihood of profiting from the information leaked by Winans. In the instant case however, the success of the scheme was not dependant on the mailings, it was dependent on obtaining the exams, taking the exams, and being promoted, none of

which involved the use of the mails.

The relevant question, as most recently enunciated by this Court in Schmuck v. United States, 489 U.S._____, 103 L.Ed. 2d. 734, 745 (1989), is "whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time ...." It is submitted, even under the arguably expansive reading of the mail element by the majority of the Court in Schmuck (see dissenting opinion, Scalia, J. at 750), that the element was not satisfied in the instant case. In Schmuck, this Court looked to the scope of the fraudulent scheme and found a large scale operation involving over 150 turned back odometers sold to a number of dealers over 15 years; not a one-shot deal, rather an ongoing fraudulent venture, the success of which depended on continued good

relations with retail dealers. Therefore, the court concluded the jury could find that the mailings of the registrations were part of the execution of a fraudulent scheme which did not reach fruition until the dealers resold the cars and effectuated the transfer of titles. In contrast, the instant case insofar as the petitioner is concerned was, indeed, a "one-shot" deal, not dependant for it's success on routine mailings. To paraphrase Justice Scalia in Schmuck, this is a case of fraud and mail, not mail fraud. This court should resolve the question of whether 18 U.S.C. §1341 applies to fraud and mail or is limited in application to "mail fraud".

CONCLUSION

For the reasons stated above the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1029

UNITED STATES,

Appellee,

v.

JAMES M. KEOHANE,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, U.S. District Judge]

Before

Campbell, Circuit Judge,

Timbers,* Senior Circuit Judge,

and Cyr, Circuit Judge.

November 5, 1990

Timbers, Circuit Judge:

Appellant James M. Keohane appeals from a judgment of conviction entered January 3, 1990 in the District of Massachusetts, Mark L. Wolf, District Judge, on a jury verdict convicting him of one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 (1988).

Appellant raises essentially two claims of error on appeal: 1) that the prosecution was barred by the statute of limitations; and 2) that the government failed to prove the mailing element of 18 U.S.C. § 1341 (1988).

We review appellant's claims in light of our decision in United States v. Doherty, 867 F.2d 47 (1st Cir.), cert. denied, 109 S. Ct. 3243 (1989), an earlier related case which addressed issues

substantially similar to those now before us. We are bound by this precedent of our Court. We reject appellant's claims.

We affirm.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

This case represents another chapter in the now infamous "Examscam" episode. Examscam involved the theft, sale and distribution of numerous purloined civil service exams by Gerald Clemente, a Metropolitan District Commission (MDC) police officer, and Thomas J. Doherty, a Medford police officer.

Clemente and Doherty began stealing

civil service exams from the offices of the Massachusetts Department of Personnel Administration (MDPA) sometime in 1976 or 1977. After stealing the exams, they would make copies and formulate answer sheets. They then would either give or sell copies of the exams and answers to other civil service candidates.

In 1979, appellant received the first of four stolen civil service exams from Clemente. Clemente gave appellant an entrance exam for appellant's son. At some unspecified later date, appellant paid Clemente $3,000 for a copy of a captain's exam. In February 1982, Clemente gave appellant a copy of the 1982 chief's exam. Finally, in February 1983, appellant agreed to pay $5,000 for a copy of the 1983 chief's exam. In addition to monetary compensation, Clemente also

expected to receive " reasonable favors' from appellant in exchange for the exams.

Appellant took the February 1983 chief's exam and scored a 97. Out of 345 candidates that took the exam, appellant was one of four candidates to score over 90. Two of the remaining three candidates to score over 90 also had copies of the purloined exam prior to the examination date. Based on the score he received on the chief's exam, appellant was appointed chief of the Malden Police Department.

On March 14, 1989, appellant was indicted on one count of conspiring to commit mail fraud. Two overt acts were charged in this indictment. On September 26, 1989, the grand jury returned a superseding indictment which charged one further overt act not contained in the initial indictment. Appellant was

convicted after a jury trial before Judge Wolf. This appeal followed. For the reasons set forth below, we affirm.

II.

We turn first to appellant's contention that the indictment charging him with conspiracy was barred by the five year statute of limitations. He claims that no overt act occurred after March 14, 1984--the date after which at least one overt act in furtherance of the conspiracy must have occurred in order to sustain appellant's conviction. 18 U.S.C. § 3282 (1988).

We disagree.

The government alleged three overt acts which occurred after March 14, 1984.

First, appellant notarized a deed purportedly signed by Clemente's father with a mark on January 23, 1985. Second, appellant caused Clemente's nephew to be hired by the Malden Police Department on March 21, 1984. Finally, appellant continued to receive salary payments in the unlawfully obtained rank of police chief during the period after March 14, 1984.

We need not rule on whether the first and second acts charged by the government are sufficient in and of themselves to constitute overt acts in furtherance of the conspiracy. It is sufficient that appellant received salary payments during a period when the special conspiracy-related societal dangers were still present. Receipt of salary payments from his unlawfully obtained position during

this period would constitute overt acts in furtherance of the conspiracy. Doherty, supra, 867 F.2d at 62.

Our analysis of appellant's claims begins and ends with our holding in Doherty, supra, 867 F.2d at 60-62. In Doherty, two defendants performed favors for Clemente in return for copies of purloined exams. The stolen exams, facilitated the defendants' obtaining elevated ranks in their respective departments. In exchange for the stolen exams, the first defendant remodeled Clemente's kitchen, provided him with confidential police information and helped his friend obtain police towing contracts. The second defendant helped Clemente's friend obtain city bail bond business. We considered the favors that the defendants performed for Clemente as being indicative

of the special dangers associated with a conspiracy, i.e., the dangers of concerted activity and group association. Id. at 62. Since the defendants received salary from their unlawfully obtained positions during the period when concerted activities were ongoing, we held that the defendants' receipt of salary payments constituted overt acts for statute of limitations purposes. Id.

Similarly, in the instant case, appellant received salary payments during a period when the special dangers associated with a conspiracy were still present. Evidence showed that on January 23, 1985, appellant notarized the mark of Clemente's father on a deed transferring title of the father's home to Clemente and his younger brother. While appellant's notarization of the deed might be

innocuous under ordinary circumstances, evidence showed that Clemente's father was partially paralyzed when he purportedly marked the deed with a shaky "X". Moreover, appellant was not present when the deed was marked; yet he notarized it and falsely attested that the father appeared before him and acknowledged the deed. Appellant's act surely represents a quid pro quo for his receipt of the stolen exam and was the type of concerted activity alluded to in Doherty.

Appellant also promised Clemente that the Malden Police Department would hire Clemente's nephew. Whether appellant, by act or omission, actually aided the nephew's ultimate appointment is irrelevant to our holding. The mere act of promising to intercede on Clemente's behalf in this matter represents the kind

of concerted activity typically associated with a conspiracy.

We therefore hold that appellant's receipt of salary payments from his position as chief of the Malden Police Department, during a period when there were special conspiracy-associated dangers, constituted overt acts within the statute of limitations period.

III.

We turn next to appellant's claim that the government failed to prove an essential element of mail fraud. Specifically, appellant contends that the government failed to prove that he knowingly caused matter to be delivered by mail for the purpose of executing a scheme or artifice to defraud. 18 U.S.C. § 1341 (1988).

We reject appellant's claim of error. We addressed this same question in Doherty. There, we held that the MDPA's mailing of notices of promotion interviews, which the defendants reasonably foresaw, was sufficient to satisfy the statute's mailing element. Doherty, supra, 867 F.2d at 65.

The record in the instant case shows that such interview notices were sent routinely by the MDPA to successful police chief candidates. It was reasonable for the jury to infer that appellant foresaw that the mails would be used in this manner.

Without considering the government's other evidence of mailings, we hold that the mailing of the notices of promotion interviews was sufficient to satisfy the mailing element of the statute.

IV.

To summarize:

Appellant's receipt of salary as chief of police, during a period where the special conspiracy-associated societal dangers were present, was sufficient to satisfy the overt act requirement of a conspiracy.

The MDPA's mailing of the notices of promotion interviews was sufficient to satisfy the mailing element of the mail fraud statute.

AFFIRMED.